No. 46657-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Lawrence Roussel,

Appellant.

Cowlitz County Superior Court Cause No. 14-1-00670-2

The Honorable Judge Marilyn Haan

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial judge erred by refusing to instruct the jury on the lesser included offense of fourth-degree assault.
2. Mr. Roussel's conviction was entered in violation of his statutory right to have the jury consider applicable lesser offenses.
3. The trial judge violated Mr. Roussel's Fourteenth Amendment right to due process by refusing to instruct on the included offense of fourth-degree assault.

> **ISSUE 1:** An accused person has an unqualified statutory right to instructions on applicable lesser-included offenses. Here, the court failed to take the evidence in a light most favorable to Mr. Roussel, and refused to instruct on the inferior degree offense of simple assault. Did the court apply the wrong legal standard and violate Mr. Roussel's right under RCW 10.61.003 to instruction on an applicable lesser-included offense?

4. Mr. Roussel's convictions infringed his Fourteenth Amendment right to due process.
5. The trial judge violated Mr. Roussel's Sixth and Fourteenth Amendment right to present a defense.
6. The trial court violated Mr. Roussel's right to present a defense under Wash. Const. art. I, § 22.
7. The trial court erred by excluding evidence that explained Mr. Roussel's self-defense/defense-of-others claim.
8. The trial court erred by excluding evidence that Ms. Roussel had accused her father of molestation, that she'd threatened to go public, and that she was shouting her accusations in the Faddens' front yard when Gary Fadden came out of his house and attacked her.

> **ISSUE 2:** An accused person has a constitutional right to present a defense consisting of relevant admissible evidence. Here, the trial judge undermined Mr. Roussel's lawful use-of-force claim by excluding evidence explaining why Gary Fadden attacked his own daughter. Did the trial judge violate Mr. Roussel's right to present a defense by excluding relevant, admissible evidence?

9. The trial judge violated Mr. Roussel's Sixth and Fourteenth Amendment right to confront adverse witnesses.

10. Mr. Roussel's convictions violated his confrontation right under art. I, § 22.

11. The trial court infringed Mr. Roussel's confrontation rights by restricting cross-examination of Gary and Laura Fadden.

12. The trial court denied Mr. Roussel the opportunity to explore the Faddens' bias against him.

> **ISSUE 3:** An accused person has a constitutional right to cross-examine adverse witnesses. Here, the trial judge refused to allow Mr. Roussel to examine the Faddens regarding their bias against him. Did the restriction on cross-examination violate Mr. Roussel's state and federal confrontation rights?

13. Mr. Roussel's conviction was based in part on private conversations illegally intercepted by Sgt. Huffine in violation of the Privacy Act.

> **ISSUE 4:** Police must strictly comply with the Privacy Act before intercepting private telephone communications. Here, the prosecution introduced evidence obtained by illegally intercepting a private phone conversation between Ms. Roussel and her mother. Did the use of this illegally intercepted communication violate the Privacy Act?

14. Mr. Roussel's convictions were based in part on an improper comment on his right to remain silent.

> **ISSUE 5**: An accused person's pre-arrest silence may not be used as substantive evidence of guilt. Here, Sgt. Huffine testified that Mr. Roussel never provided him with medical records confirming that he and his wife had received treatment for the injuries inflicted by Gary Fadden. Did the introduction of this evidence amount to an improper comment on Mr. Roussel's right to remain silent?

15. Prosecutorial misconduct deprived Mr. Roussel of his Sixth and Fourteenth Amendment right to a fair trial.

16. Prosecutorial misconduct infringed Mr. Roussel's Fifth and Fourteenth Amendment right to remain silent.

17. The prosecutor committed misconduct by urging jurors to consider Mr. Roussel's pre-arrest silence as substantive evidence of guilt.

ISSUE 6: A prosecutor may not rely on a suspect's pre-arrest silence (including partial silence) as substantive evidence of guilt. Here, the prosecutor argued that jurors could use Mr. Roussel's failure to provide his medical records to police as evidence of his guilt. Did the prosecutor infringe Mr. Roussel's right to a fair trial and his privilege against self incrimination?

18. The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by making an improper missing witness argument.

19. The prosecutor's missing witness argument improperly shifted the burden of proof onto Mr. Roussel.

ISSUE 7: A "missing witness" argument is only permissible if the proponent gives the opposing party enough notice to be able to explain the witness's absence. Here, the prosecutor argued the missing witness doctrine in closing without giving Mr. Roussel the opportunity to explain the witness's absence. Did prosecutorial misconduct violate Mr. Roussel's right to due process?

20. The prosecutor committed misconduct by misrepresenting the burden of proof.

21. The prosecutor committed misconduct by encouraging jurors to convict because the Faddens were more believable than the Roussels.

22. The prosecutor committed misconduct by suggesting that jurors would have to disbelieve Gary and Laura Fadden in order to acquit Mr. Roussel.

ISSUE 8: A prosecutor commits misconduct by shifting the burden of proof and undermining the presumption of innocence. Here the prosecutor argued that the jury could convict by determining which version of events was more believable, and that acquittal required them to disbelieve the state's witnesses. Did the prosecutor commit misconduct that was flagrant and ill-intentioned in violation of Mr. Roussel's right to due process?

23. Mr. Roussel was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

24. Defense counsel was ineffective for failing to object to the introduction of evidence obtained in violation of the Privacy Act.

ISSUE 9: The Sixth and Fourteenth Amendments guarantee an

accused person the effective assistance of counsel. In this case, defense counsel failed to object to the admission of prejudicial evidence obtained in violation of the Privacy Act. Was Mr. Roussel denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

25. Defense counsel provided ineffective assistance by failing to object to inadmissible evidence bolstering the Faddens' credibility.

    ISSUE 10: Defense counsel provides ineffective assistance by failing to object to inadmissible evidence absent a valid tactical reason. Here, Mr. Roussel's attorney waived objection to evidence that bolstered the Faddens' testimony, in a case that hinged on their credibility. Was Mr. Roussel denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

26. Defense counsel provided ineffective assistance by failing to object to prosecutorial misconduct.

    ISSUE 11: A defense attorney should not allow her or his client to be prejudiced by prosecutorial misconduct. Here, counsel failed to object when the prosecutor improperly commented on Mr. Roussel's right to remain silent and made improper arguments that shifted the burden of proof. Did counsel's unreasonable failure to object deny Mr. Roussel denied his right to the effective assistance of counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Rebecca Roussel accused her father Gary Fadden of molesting her. RP 23, 465-469. She had been repeating the allegation for many years. RP 23, 465-469. In 2014, her parents agreed to help her buy a mobile home to live in with her husband Larry Roussel and she agreed to not take her accusations further. RP 24, 84, 260.

Larry and Rebecca Roussel had been married about a year when they were moving into the trailer. RP 53, 188-190, 256. In late May, the couple was at their storage unit and argued. RP 192-193, 262. Mr. Roussel left the area to cool down. His wife started walking, and after some time called her mother for a ride. RP 55, 194-195, 264. Laura Fadden picked up her daughter, who asked to be driven to the trailer. RP 56, 194-196.

Mr. Roussel was at the trailer, having fallen asleep after consuming a few beers. RP 57, 197-198, 265. The couple argued, and Mrs. Fadden asked Mr. Roussel for the money she had given the couple a few days before. RP 59. Mr. Roussel threw $172 at her, as well as his wedding ring. RP 59. The couple made up, Mrs. Fadden gave Mr. Roussel his ring back, and left. RP 59-61, 199-200, 266.

When Mrs. Fadden left, she took her daughter's phone and keys with her. RP 61. She later explained she did this so that the couple couldn't drive, and because she had been the one to pay for the phone. RP 61.

When Rebecca Roussel realized that her mother had her keys and phone, she and Mr. Roussel got into their car and drove to the Fadden's home. She went inside to get her keys and phone, and spoke to her parents. She was angry and made accusations. RP 63, 106-107, 214, 269. She asked for the title to the trailer to be signed over to her, but her parents declined. RP 107.

Gary Fadden began hitting his daughter with his walking stick. She tried to defend herself, but he landed blows on her head and body. RP 202-203, 205-208. He hit her over 20 times, swinging the stick like a bat. RP 206-208, 232-233. Mr. Roussel, who was waiting in the car, saw the attack and ran toward the house. He wrestled the stick away from his father-in-law and threw it in the yard. RP 150, 208, 211, 269-274, 290-294.

Mr. Fadden called the police, but hung up without talking to anyone.[1] RP 112-113. Police came to the house and Mrs. Roussel told

[1] The beating knocked the phone out of Rebecca Roussel's hand and it fell and cracked. RP 208-210.

them that all were fine and no assistance was needed. After maintaining the position for some time, she then claimed for the first time that Mr. Roussel assaulted her and her husband. RP 81-82, 145-146.

Mr. and Mrs. Roussel were arrested. Both told police that they were the victims of the altercation, and showed police their injuries. RP 168-177. They also completed written statements. RP 180.

The officer who responded to the call was Sgt. Huffine. RP 144. In 2008, he had arrested Mr. Roussel. RP 16. During the ride to the police station, Huffine slammed on the brakes so hard that Mr. Roussel was thrown into the partition and injured. RP 16-18. Mr. Roussel sued the county, who settled the claim with a payment of over $7000 to Mr. Roussel. RP 16-18.

The state charged Larry Roussel with assault two with a deadly weapon and assault four. CP 1-2.

At trial, the defense sought to explain the family altercation. The source of the friction was the prior sex abuse at the hands of Mr. Fadden, but the court did not allow the information to be presented to the jury. RP 23-27, 183-187.

Laura Fadden testified that once at her home, she was out at the car with the Roussels and she reached across her daughter and grabbed Mr. Roussel's shirt. She also told the jury that Mr. Roussel pushed her and

she fell onto the ground and hit her head.[2] RP 63-66, 79. Gary Fadden said that he saw Mr. Roussel push his wife, armed himself with his walking stick and went outside. RP 110, 123. He testified that Mr. Roussel took the stick and tried to choke him with it. RP 110. He denied hitting his daughter at all. RP 125.

When Sergeant Huffine testified, he said that Mrs. Fadden "was attempting to minimize the situation." RP 145. He also said he "eventually" got her to "open up" when she said the "same thing we heard here in court." RP 146. He also said that Gary Fadden told him "about what happened, like what we heard here in court[.]" RP 148. The defense did not object to any of the testimony. RP 145-146, 148.

Huffine also described his efforts to talk to and get information from Mr. and Mrs. Roussel. He said that he called multiple times, and that he told Mr. Roussel he needed to get his side of the story and take his statement. RP 154. Huffine told the jury that Mr. Roussel told him he made a report and went to the hospital, but that Mr. Roussel did not provide him with any copies or a medical release or a written statement. RP 154-155. There was no objection to this testimony. RP 153-155.

[2] Rebecca Roussel told the jury that her mother must have been hit while trying to help Gary Fadden with the stick. She said that Mr. Roussel did not push Laura Fadden. RP 219.

Both Mr. and Mrs. Roussel denied that Mr. Roussel assaulted anyone. RP 211, 272-275.

During its rebuttal case, the state offered again testimony from Huffine. He said that he listened in on a phone extension to a call between Mrs. Roussel and her mother. RP 308-310. Over a defense objection,[3] the officer told the jury that he heard Mrs. Fadden tell her daughter that her daughter's injuries were not from her father but from Mr. Roussel throwing her around. RP 309-310. Huffine said that in response to this, Mrs. Roussel exploded with anger and told her mother not to make such statements or that she would be brought down. RP 309-310.

The defense proposed a lesser include instruction of assault four, which the court declined to give. RP 324-335. The judge reasoned that since neither Roussel admitted that Mr. Roussel had committed an assault, there was no factual basis. RP 333-334.

During closing argument, the prosecutor told the jury that there were two versions, and they had to choose one. RP 361-362. He also said that the jury should consider that while both Roussels claimed medical care was sought, they did not provide any proof of that or bring the doctor

[3] The specifics of the objection were not recorded as they occurred at a sidebar, though it appears to be based on hearsay. RP 309-311.

to testify. RP 374-375. He also told the jury to be suspicious of their assault claim since they did not call the police right away. RP 376.

Again during rebuttal, the prosecutor told the jury the case came down to who they believed. RP 412.

The jury entered a verdict of guilty as charged. CP 44-48. After sentencing, Mr. Roussel timely appealed. CP 63-76.

ARGUMENT

I. THE JUDGE VIOLATED MR. ROUSSEL'S ABSOLUTE AND UNQUALIFIED RIGHT TO HAVE THE JURY INSTRUCTED ON SIMPLE ASSAULT.

When there is "even the slightest" evidence that an accused person committed only an inferior offense, the court must instruct jurors on that offense. *State v. Parker,* 102 Wn.2d 161, 163-164, 683 P.2d 189 (1984). Here, there was more than slight evidence that Mr. Roussel committed only simple assault against Gary Fadden. Despite this, the court refused to instruct on simple assault.

The court should give the instructions even if the accused person denies committing the inferior offense or presents other defenses. *State v. Fernandez-Medina*, 141 Wn.2d 448, 6 P.3d 1150 (2000). Here, the record contained evidence that Mr. Roussel committed only simple assault, but

the court erroneously refused to instruct on the inferior offense because Mr. Roussel claimed self-defense/defense-of-others.[4] RP 324-334.

The court must interpret this evidence in favor of instructing on the inferior charge. *Fernandez-Medina*, 141 Wn.2d at 456. Applying this standard, the jury could have found that Mr. Roussel committed only simple assault.

A. At least slight evidence showed that Mr. Roussel committed only simple assault rather than assault by strangulation.

Assault by strangulation requires proof that the accused person actually compressed the alleged victim's neck. *State v. Reed*, 168 Wn. App. 553, 575, 278 P.3d 203 (2012). Here, the jury could have believed that Mr. Roussel assaulted Fadden but did not actually compress his neck.

The investigating officer wrote in his report that Fadden had no visible marks on him. RP 161. Laura Fadden testified that Mr. Roussel had the stick over her husband's chest, not his neck. She also said "luckily, Gary is strong, because he was pushing up" and successfully resisting Mr. Roussell's efforts. RP 67-68.

Taking this evidence in a light most favorable to Mr. Roussel, the jury could have concluded that he assaulted Fadden, but did not actually

[4] The court's refusal was thus based on an error of law, subject to review *de novo*. *City of Tacoma v. Belasco*, 114 Wn. App. 211, 214, 56 P.3d 618 (2002).

compress his neck. *Fernandez-Medina*, 141 Wn.2d at 456. This amounts to simple assault.[5] *Reed,* 168 Wn. App. at 575. The court should have granted Mr. Roussel's request for instructions on fourth-degree assault. *Fernandez-Medina*, 141 Wn.2d at 456.

B. At least slight evidence showed that Mr. Roussel assaulted Gary Fadden without a deadly weapon.

To convict Mr. Roussel under the deadly-weapon alternative, the state had to prove that Mr. Roussel attacked Fadden using the walking stick in a manner readily capable of causing death or substantial bodily harm. CP 30. However, when interpreted in Mr. Roussel's favor, at least slight evidence showed that he assaulted Fadden without a deadly weapon.

For example, Mr. Roussel testified that he squared off with Fadden, wrestled the stick away from him, and threw it; Mrs. Roussel confirmed this. RP 211, 273. Fadden testified that Mr. Roussel attacked him without provocation and knocked him to the ground. RP 110.

From this evidence, the jury could have believed that Mr. Roussel attacked Fadden, took his stick, and threw it away. Alternatively, jurors could have believed that Mr. Roussel defended himself against an attack

[5] It might also qualify as attempted second-degree assault; however, neither party requested instructions on that offense. CP 3-17; Plaintiff's Proposed Instructions, Supp. CP.

by Fadden, but that he was disqualified from claiming self-defense/defense-of-others after having pushed Laura Fadden. RP 65.

C. The failure to instruct on simple assault requires reversal and a new trial.

The right to an appropriate inferior-degree offense instruction is unqualified and absolute; failure to give such an instruction requires reversal. *Parker,* 102 Wn.2d at 163-164. Here, the trial court violated Mr. Roussel's absolute and unqualified right to have the jury instructed on simple assault. *Parker,* 102 Wn.2d at 163-164. His conviction must be reversed and the case remanded for a new trial. *Id.* at 166.

II. THE COURT INFRINGED MR. ROUSSEL'S CONFRONTATION RIGHT AND HIS RIGHT TO PRESENT A DEFENSE.

Mr. Roussel's trial theory—self-defense/defense-of-others—required jurors to believe that Gary Fadden attacked his own daughter with a walking stick. The defense story only made sense if jurors understood that Fadden attacked Ms. Roussel because she'd accused him of molesting her, had threatened to go public, and was shouting about the accusation in his yard. RP 23-25.

The trial court refused to allow the defense to explain the conflict to the jury. Jurors were left with the impression that Fadden came outside and inexplicably began beating his own daughter for no reason.

Indeed, the prosecutor made this point repeatedly in closing:

> in [the defense] version, Gary Fadden, *for no identified reason*, just comes out of the house and begins whacking his daughter with this stick…
> RP 361 (emphasis added).

> What [Mr. Roussel] described is [Gary Fadden] trying to kill his daughter with a stick, whacking her *completely out of nowhere, not in response to an argument or anything*. His own daughter, hitting her in the face… *It made no sense whatsoever.* Why would he do that? There's absolutely – *it's just so out of left field, what they're claiming*...
> Is this man going to attack his daughter and start pounding her in the face with a stick? *That just doesn't make sense.* There's different ways things can go down, but you can be sure that's not how it went down.
> RP 412-413 (emphasis added).

> [T]heir explanation of why he gets the stick is no explanation. He just randomly attacks his daughter *for no reason whatsoever, unprovoked. That makes no sense.*
> RP 421 (emphasis added).

By prohibiting the defense from explaining the conflict, the court violated Mr. Roussel's right to present a defense (by making his self-defense/defense-of-others claim completely unbelievable) and his confrontation right (by suppressing cross-examination that would have exposed the Faddens' bias).

A. The court excluded relevant admissible evidence fundamental to Mr. Roussel's self-defense claim.

Due process guarantees the right to present a defense. U.S. Const. Amends. XIV; art. I, § 22; *Holmes v. South Carolina*, 547 U.S. 319, 324,

126 S.Ct. 1727, 164 L.Ed.2d 503 (2006).[6] By excluding Ms. Roussel's molestation accusation, the trial court violated Mr. Roussel's right to present a defense.

The right to present a defense includes the right to introduce relevant[7] and admissible evidence. *State v. Lord*, 161 Wn.2d 276, 301, 165 P.3d 1251 (2007). Here, Gary Fadden's molestation of his daughter was the root of the conflict between Fadden and the Roussels. RP 23-25. Evidence of Ms. Roussel's accusation was relevant and admissible to explain Fadden's (otherwise inexplicable) attack on his own daughter and Mr. Roussel's state of mind when he used force to defend her.

Where evidence is highly probative, no government interest can be compelling enough to preclude its introduction. *State v. Jones*, 168 Wn.2d 713, 721, 230 P.3d 576 (2010) (Jones I). Any evidence supporting an accused person's theory of the case is highly probative. *Id.* Here, the excluded evidence supported Mr. Roussel's theory of the case. The trial court should have admitted the evidence.[8] *Id.* Its refusal to do so violated Mr. Roussel's right to present a defense. *Holmes,* 547 U.S. at 324.

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[6] The compulsory process clause also contributes to the right. *Id.;* U.S. Const. Amend. VI.

[7] Evidence is relevant if it has any tendency to prove a material fact. ER 401. The threshold to admit relevant evidence is low; even minimally relevant evidence is admissible. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010).

[8] The prosecutor, who thought the evidence unduly prejudicial, could have sought an instruction limiting the jury's consideration of it. RP 26.

Denial of this right requires reversal unless the state shows beyond a reasonable doubt that the error did not affect the verdict. *State v. Elliott*, 121 Wn. App. 404, 410, 88 P.3d 435 (2004); *State v. Fisher*, 165 Wn.2d 727, 755, 202 P.3d 937 (2009). The state cannot make that showing here, because the excluded evidence was important to the defense theory.

Mr. Roussel's defense hinged on evidence that Ms. Roussel had accused her father of molestation. Under Mr. Roussel's theory, Gary Fadden came outside and assaulted his daughter (Mr. Roussel's wife) because she was shouting about the accusation in the Faddens' front yard. Mr. Roussel responded to Gary Fadden's attack on Ms. Roussel by using force to defend his wife against her former abuser. RP 23-25.

In the absence of the excluded evidence, the defense story had no context, made no sense, and seemed like a fabrication. The prosecution took advantage of this in closing. RP 361, 412-413, 421.

Only by understanding the conflict between Ms. Roussel and her father could the jury comprehend why Fadden came outside and hit his daughter with his walking stick.[9] Without the evidence, the defense seemed like nonsense.

[9] Furthermore, the molestation allegations explained why the Faddens hung up before connecting with 911 and why both Faddens might lie to discredit their daughter and her husband.

The exclusion of this critical evidence prejudiced Mr. Roussel. *Elliott*, 121 Wn. App. at 410. His conviction must be reversed and the case remanded with instructions to allow testimony about Ms. Roussel's accusation against her father. *Id.*

B. The trial court prevented Mr. Roussel from cross-examining the Faddens regarding their bias against him.

Mr. Roussel sought to cross-examine the Faddens about their bias against their daughter and son-in-law. His theory was that both Faddens were biased against him because his wife had accused Gary Fadden of molestation, had threatened to go public, and was shouting about the molestation in the Faddens' front yard. RP 23-25.

In addition to explaining Gary Fadden's attack on his own daughter, the evidence would have explained why both Faddens might lie to discredit Mr. Roussel and his wife. Ms. Roussel's accusation of molestation provided the Faddens strong grounds for bias against Mr. and Ms. Roussel. The trial court should have allowed inquiry about the fact of the accusation, Ms. Roussel's threats to go public, and the statements she made that prompted Fadden to come out of the house and attack her.

An accused person "has a constitutional right to impeach a prosecution witness with bias evidence." *State v. Spencer*, 111 Wn. App. 401, 408, 45 P.3d 209 (2002). Evidence of witness bias is relevant and

admissible. *United States v. Abel*, 469 U.S. 45, 50-51, 55-56, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984) (interpreting Federal Rules of Evidence). Cross-examination designed to elicit witness bias directly implicates the Sixth Amendment. *United States v. Martin*, 618 F.3d 705, 727 (7th Cir. 2010).

By limiting cross-examination into the Faddens' bias and the grounds therefor, the trial court infringed Mr. Roussel's confrontation right. *Spencer*, 111 Wn. App. at 408. His convictions must be reversed and the case remanded for a new trial, with instructions to allow the defense to fully expose the Faddens' bias. *Id.*

III. MR. ROUSSEL'S CONVICTIONS MUST BE REVERSED BECAUSE THE EVIDENCE USED TO CONVICT HIM INCLUDED TESTIMONY ABOUT AN ILLEGALLY INTERCEPTED TELEPHONE CONVERSATION.

A. Sgt. Huffine illegally listened in on a private phone conversation between Ms. Roussel and Laura Fadden.[10]

Washington's Privacy Act requires suppression of "[a]ny information" obtained in violation of RCW 9.73.030. RCW 9.73.050. In this case, Sergeant Huffine illegally intercepted a telephone call between

[10] An accused person has standing to object to any violation of the Privacy Act. *State v. Williams*, 94 Wn. 2d 531, 544-46, 617 P.2d 1012 (1980). This is so even if the accused did not participate in the illegally recorded conversation. *Id.* Thus, Mr. Roussel has standing to object to the violation of his wife's Privacy Act rights. *Id.*

Ms. Roussel and her mother by listening in on an extension. The state improperly used his account of the conversation to impeach Mrs. Roussel, and relied on it in closing argument.[11] RP 309-310, 376, 420.

The Act prohibits interception of any private telephone communication using any device designed to "transmit said communication." RCW 9.73.030(1)(a). In this case, the telephone extension was such a device.

The conversion of an inaudible signal into an audible signal qualifies as transmission. *State v. Christensen*, 153 Wn.2d 186, 197, 102 P.3d 789 (2004). A telephone extension receives an electronic signal which is converted into an audible signal, transmitted through the earpiece's speaker. Accordingly, the extension handset is a device covered by RCW 9.73.030(1)(a). The evidence should not have been used against Mr. Roussel at trial. RCW 9.73.050.

A violation of the Privacy Act requires reversal unless there is no reasonable probability that the error materially affected the outcome. *Id.*, at 200. Huffine's testimony about the illegally intercepted conversation prejudiced Mr. Roussel. There is a reasonable probability that it materially affected the outcome. *Id.*

[11] Evidence obtained in violation of the Privacy Act may not be used for the purpose of impeachment. *State v. Faford*, 128 Wn.2d 476, 488, 910 P.2d 447 (1996).

The participants' credibility was critical to the outcome of the case. Huffine had already improperly bolstered the Faddens' testimony and provided a personal opinion;[12] his account of the illegally intercepted conversation provided further support to their account, and diminished the credibility of Mr. Roussel's main supporting witness. The prosecutor thought the testimony sufficiently important to mention it more than once in closing. RP 376, 420.

Because credibility was central to this case, the improper admission of the evidence prejudiced Mr. Roussel. Accordingly, his conviction must be reversed, the evidence suppressed, and the case remanded for a new trial.

B. The court should consider this Privacy Act violation raised for the first time on review.

The Privacy Act mandates that illegally obtained information "shall be inadmissible." RCW 9.73.050. This categorical bar reflects the legislature's strong desire to protect the privacy of Washington residents, including those engaged in criminal activity. *Williams,* 94 Wn.2d at 548; *Christensen,* 153 Wn.2d at 201. The robust expression of this sentiment suggests the legislature intended to allow parties to raise Privacy Act

[12] Defense counsel did not object when the officer opined that Laura Fadden's initial statements were minimizing, or when he told the jury that both Faddens' statements were consistent with the testimony they'd provided in court. RP 145-146; 148. Counsel's failure is raised elsewhere in this brief.

violations on review, even absent objection in the trial court. *See* RCW 9.73.050.

Furthermore, the Court of Appeals has discretion to accept review of *any* issue argued for the first time on appeal. RAP 2.5(a); s*ee State v. Russell,* 171 Wn.2d 118, 122, 249 P.3d 604 (2011). The Court of Appeals should review Mr. Roussel's Privacy Act arguments on their merits.[13] *Id.*

IV. PROSECUTORIAL MISCONDUCT DENIED MR. ROUSSEL A FAIR TRIAL.[14]

A. The prosecutor improperly commented on Mr. Roussel's pre-arrest silence.

A person's pre-arrest silence—including partial silence—may not be used as substantive evidence of guilt. *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008); *Combs v. Coyle*, 205 F.3d 269, 285 (6th Cir. 2000). Here, the prosecutor introduced evidence that Mr. Roussel didn't provide his medical records to Sgt. Huffine, and argued in closing that it

[13] In the alternative, defense counsel provided ineffective assistance by failing to object under the Privacy Act. Counsel's failure is addressed elsewhere in this brief.

[14] Absent an objection, a court can consider prosecutorial misconduct for the first time on appeal, and must reverse if the misconduct was flagrant and ill-intentioned. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). A reviewing court analyzes the prosecutor's statements during closing in the context of the case as a whole. *State v. Jones*, 144 Wn. App. 284, 291, 183 P.3d 307 (2008) (Jones II).

was "suspicious" of him not to talk to police until he was arrested.[15] RP 154-155, 374, 376.

Both Huffine's testimony and the prosecutor's closing argument improperly suggested that jurors could convict based on Mr. Roussel's partial silence. The prosecutor committed misconduct by eliciting the evidence and by making the improper closing argument.[16] *Burke*, 163 Wn.2d at 217; *see also State v. Keene*, 86 Wn. App. 589, 593-94, 938 P.2d 839 (1997).

An impermissible comment on the right to silence requires reversal unless the state proves harmlessness beyond a reasonable doubt. *State v. Fuller*, 169 Wn. App. 797, 813, 282 P.3d 126 (2012). The two comments here were not harmless because they were not "trivial, or formal, or merely academic." *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000).

The comments prejudiced Mr. Roussel and affected the outcome of the case. *Id.* The state's evidence was not strong; conviction required the

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[15] The argument also misrepresented Sgt. Huffine's testimony. According to Huffine, Mr. Roussel told him over the phone that he'd seen a doctor for injuries inflicted during the fight. This conversation occurred prior to arrest. RP 154-155.

[16] The misconduct was flagrant and ill-intentioned, and could not have been cured by an instruction. Accordingly, it may be reviewed for the first time on appeal. *Glasmann*, 175 Wn.2d at 704.

jury to believe the Faddens' testimony beyond a reasonable doubt and to disbelieve Mr. Roussel's account beyond a reasonable doubt.

By suggesting that Mr. Roussel was guilty based on his partial silence, the prosecutor unfairly encouraged the jury to convict based on improper factors. *Id.* Mr. Roussel's convictions must be reversed and the case remanded for a new trial. *Burke*, 163 Wn.2d at 217.

B. The prosecutor committed misconduct by misstating the burden of proof.

1. The prosecutor made an improper missing witness argument.

In closing, the prosecutor argued that "[w]e don't have the doctor here, but [the Roussels] claim they went to the doctor." RP 374. This was improper, because the prosecutor failed to follow the requirements of the missing witness rule.

A prosecutor may not point out a defendant's failure to call a witness unless the missing witness rule applies. *State v. Dixon*, 150 Wn. App. 46, 54, 207 P.3d 459 (2009). Here, the prosecutor's missing witness argument violated the rule. RP 374.

The missing witness rule requires a prosecutor to raise the argument early enough in the proceedings to provide an opportunity for rebuttal or explanation. *State v. Montgomery*, 163 Wn.2d 577, 598, 183 P.3d 267 (2008). In this case, the prosecutor raised the argument for the

first time in closing. RP 374. At that point, it was too late for Mr. Roussel to summon the doctor to testify. It was also too late for him to explain the doctor's absence.

Because the accused has no duty to present evidence, a prosecutor generally cannot comment on the lack of defense evidence. *State v. McCreven*, 170 Wn. App. 444, 470-71, 284 P.3d 793 (2012). The missing witness rule provides a narrow exception; however, the prosecutor must invoke the rule at a time when the defense can produce evidence in response. *Montgomery*, 163 Wn.2d at 598. The state failed to do so in this case.

Mr. Roussel was prejudiced by the prosecutor's improper missing witness argument. *Glasmann*, 175 Wn.2d at 704. The argument suggested that jurors should discount Mr. Roussel's self-defense/defense-of-others claim because of his failure to present the doctor's testimony. Instead of focusing exclusively on the evidence presented, the prosecutor sought to undermine the defense with an improper missing witness argument. There is a substantial likelihood that the prosecutor's improper argument affected the verdict. *Glasmann*, 175 Wn.2d at 704.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by making an improper missing witness argument in closing.

Id.; Montgomery, 163 Wn.2d at 598-99. Mr. Roussel's conviction must be reversed. *Montgomery*, 163 Wn.2d at 598-99.

2. The prosecutor improperly suggested that the jury's task was to determine which version of events to believe.

A prosecutor's misstatement of the burden of proof creates "great prejudice." *State v. Johnson*, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010). Here, the prosecutor mischaracterized the burden of proof by arguing that the jury's task was to decide which version of events to believe. This misconduct requires reversal. *Id.*

A jury's job is neither to solve a case nor to declare what happened. *State v. Anderson*, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009).[17] The prosecutor here improperly suggested that the jury's task was to weigh competing accounts and to determine what happened.

The prosecutor argued that the case "really does come down to who you believe." RP 412. He summarized the jury's role thus:

> [Y]ou got to hear from the Faddens, and then the [Roussels], and you get to evaluate, *and that's the jury's job, evaluate their credibility, who is telling the truth?*
> RP 363-364 (emphasis added).

The prosecutor characterized the evidence as "two different sides," and reiterated that "[t]here's one side versus the other; they can't both be

[17] Instead, the jury's job is to determine whether or not the state has proved its case beyond a reasonable doubt. *Id.; Glasmann*, 175 Wn.2d at 713.

true." RP 362, 411. Later he described the Faddens' testimony as "the other side" when distinguishing it from the Roussels' testimony. RP 422.

The prosecutor also told jurors that "really the only real thing that's at issue in this case" was whether Mr. Roussel acted in defense of his wife or whether Garry Fadden acted in defense of Laura Fadden. RP 361. He characterized these two narratives as "two competing versions of what happened." RP 361. After repeating that the two sides had "competing versions," he asked the jury "[w]hen you have two different versions of what happened, *how can you know what happened?*" RP 363 (emphasis added).[18]

Much of the prosecutor's closing consisted of argument that the Faddens were more believable than the Roussels. The prosecutor systematically compared the two accounts, urging the jury to believe the Faddens over the Roussels.

For example, the prosecutor contrasted Mrs. Roussel's prior convictions with Laura Fadden's purportedly "straightforward," consistent, and detailed account, and asked the jury "Did [Laura Fadden] come across like someone who was hiding something?" RP 386-387.

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[18] The prosecutor also emphasized how different the two versions were, telling jurors that they were "not just a matter of perspective," but rather were "completely opposed," and that "they can't both be – the stories just contradict too much." RP 361, 363-364.

Similarly, the prosecutor pointed out inconsistencies in the Roussels' testimony, and then argued that Gary Fadden's tears told jurors how "real" his testimony was. RP 386-388.

Another such juxtaposition came in the prosecutor's rebuttal:

> Because what [the Faddens] described is him trying to strangle him with a deadly weapon. What [Mr. Roussel] described is [Gary Fadden] trying to kill his daughter with a stick, whacking her completely out of nowhere, not in response to an argument or anything. His own daughter, hitting her in the face…It made no sense whatsoever. Why would he do that? There's absolutely -- it's just so out of left field, what they're claiming.
> RP 412.

The prosecutor returned to this theme more than once, comparing the Faddens' consistency with Mrs. Roussel's account which (he claimed) made "no sense whatsoever." RP 419. He suggested that the Roussels gave "no explanation" for Gary Fadden's attack on his daughter,[19] but that the Faddens' account "entirely makes sense." RP 421.

Finally, the prosecutor concluded his rebuttal argument by explicitly pitting the two competing versions against each other. Having started by claiming that "really the only real thing that's at issue in this

[19] An argument that was possible only because the court excluded evidence of Ms. Roussel's molestation accusation, her threat to go public, and the fact that she was shouting about the accusation when Gary Fadden attacked her. RP 23-27.

case"[20] was which of the two men was entitled to defend using force, he argued that:

> [Gary Fadden's] use of force was lawful; the Defendant's use of force was not lawful. Find him guilty.
> RP 423.

The prosecutor did not cure the misconduct or diminish its effect by discussing the state's burden of proof. In fact, he did not mention the word "burden" even once during closing argument. RP 360-388, 411-422. The only time he mentioned the "reasonable doubt" standard came in passing, when he quoted the court's aggressor instruction. RP 381.

The prosecutor mischaracterized the state's burden as a competition between two different versions of events. Instead of reminding the jury of the state's responsibility to prove the elements beyond a reasonable doubt, the prosecutor diminished the state's obligation, urging jurors to convict if they thought the Faddens more believable than the Roussels.

This flagrant and ill-intentioned misconduct prejudiced Mr. Roussel and infringed his right to due process. *Glasmann*, 175 Wn.2d 696, 704. His convictions must be reversed and the case remanded for a new trial. *Id.*

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[20] RP 361.

3. The prosecutor improperly argued that jurors would have to disbelieve the Faddens in order to acquit Mr. Roussel.

It is misconduct to suggest that an acquittal requires the jury to believe the state's witness were lying or mistaken. *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996). The prosecutor in this case made such an argument.

According to the prosecutor, the issue of self-defense rested on whether or not the Faddens lied:

> If you believe the Faddens, you're going to find [Mr. Roussel] was the aggressor. If you don't believe the Faddens, you're not going to…so it really doesn't even get into all the ins and outs of the self-defense.
> RP 422.

The prosecutor made other arguments suggesting that acquittal required the jury to find that the Faddens had lied. For example, the prosecutor exhorted jurors to consider Gary Fadden's tearful testimony and then to "ask yourself, *was he lying*?" RP 388 (emphasis added). The prosecutor returned to this question in rebuttal: "[A]sk yourselves, *was he making that up* when he broke down and cried?" RP 419 (emphasis added). The prosecutor posed a similar rhetorical question regarding Laura Fadden's testimony, asking "Did she come across like someone who was hiding something?" RP 387.

These comments suggested that jurors would have to find the Faddens lying in order to acquit Mr. Roussel. This is especially true when considered in conjunction with the prosecutor's other burden-shifting arguments.

The misconduct was flagrant and ill-intentioned. *Id.* Mr. Roussel's convictions must be reversed, and the case remanded for a new trial. *Id.*

V. MR. ROUSSEL WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review.

Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a).

An ineffective assistance claim presents a mixed question of law and fact, reviewed *de novo*. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). Reversal is required if counsel's deficient performance prejudices the accused. *Kyllo*, 166 Wn.2d at 862 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

B. Defense counsel provided ineffective assistance by failing to object to inadmissible evidence.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland*, 466 U.S. at 685. Counsel's performance is deficient if it falls below an objective standard of reasonableness. U.S. Const. Amends. VI, XIV; *Kyllo*, 166 Wn.2d at 862. Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*

Defense counsel provides ineffective assistance by failing to object to inadmissible evidence absent a valid strategic reason. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (*citing State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)). Reversal is required if an objection would likely have been sustained and there is a reasonable probability that the result of the trial would have been different without the inadmissible evidence. *Id.*

1. If Mr. Roussel's Privacy Act argument is not preserved, counsel provided ineffective assistance.

In this case, defense counsel raised a hearsay objection to Sgt. Huffine's testimony describing the illegally intercepted phone call between Ms. Roussel and her mother. RP 309-310. If Mr. Roussel's

Privacy Act arguments[21] cannot be raised for the first time on review, then counsel's performance was deficient.

The fact that counsel sought suppression of the evidence shows that he was pursuing a strategy of excluding the evidence. RP 309-310. Accordingly, counsel's failure to argue the correct grounds for suppression cannot be explained as a legitimate strategic or tactical choice. *Saunders*, 91 Wn. App. at 578.

A successful motion would have resulted in suppression of Sgt. Huffine's testimony, in which he confirmed Laura Fadden's account of her interactions with her daughter. This testimony was critical, because very little independent evidence enabled the jury to evaluate the credibility of the witnesses. By confirming Laura Fadden's position on this issue, Huffine leant credibility to their whole account.

Counsel should have raised a Privacy Act objection. *Id.*

2. Defense counsel should have objected to Sgt. Huffine's testimony bolstering the credibility of Gary and Laura Fadden.

Without any objection from defense counsel, Sgt. Huffine was permitted to tell the jury that both Laura and Gary Fadden provided information that was consistent with their in-court testimony. RP 146, 148. Defense counsel should have objected to this testimony.

[21] Outlined above.

Although it did not include direct quotations, Sgt. Huffine's testimony conveyed hearsay to the jury and should have been excluded under ER 802. *See State v. Martinez*, 105 Wn. App. 775, 782, 20 P.3d 1062 (2001) *overruled on other grounds by State v. Rangel-Reyes*, 119 Wn. App. 494, 81 P.3d 157 (2003). Counsel should have raised a hearsay objection.

The testimony also improperly bolstered the Faddens' credibility. Repetition is not generally a valid test for veracity. *State v. Purdom*, 106 Wn.2d 745, 750, 725 P.2d 622 (1986). Mr. Roussel did not make a claim of recent fabrication or allege that the Faddens' motives changed between the time they gave the statement and the time they testified. *Id.; see also* ER 801(d)(1)(ii). The substance of these prior consistent statements should not have been conveyed to the jury. *Id.* Defense counsel should have objected.

The problem was compounded because Sgt. Huffine provided an improper opinion on Laura Fadden's credibility. He testified that her initial statements were "minimizing," thus suggesting that her later statements—consistent with her in-court testimony—were the truth. RP 145-146.

No witness may provide an opinion as to another witness's credibility. *State v. Sutherby*, 138 Wn. App. 609, 617, 158 P.3d 91 (2007)

aff'd on other grounds, 165 Wn.2d 870, 204 P.3d 916 (2009). Such testimony invades the exclusive province of the jury. *Id.* Defense counsel should have objected to the improper opinion testimony. *Id.*

Defense counsel had no strategic reason to waive objection. The Faddens' testimony formed the cornerstone of the state's case. Their credibility was crucial to the prosecution, and Sgt. Huffine's improper testimony unfairly bolstered their account. Defense counsel should have objected. *Id.*

3. Mr. Roussel was prejudiced by his attorney's deficient performance.

There is a reasonable possibility that counsel's failure to object to inadmissible evidence affected the outcome. The prosecution's case hinged on the Faddens' credibility. Sgt. Huffine's testimony about the illegally intercepted telephone conversation bolstered Laura Fadden's testimony, as did his opinion that her initial statement was "minimizing." The Sergeant's claim that both Faddens testified in a manner consistent with their out-of-court statements added additional weight to their account. RP 145-146, 148.

Defense counsel's failure to object to this testimony prejudiced Mr. Roussel. His convictions must be reversed for ineffective assistance. *Saunders*, 91 Wn. App. at 578.

C. Defense counsel unreasonably failed to object to the prosecutor's misconduct.

Failure to object to prosecutorial misconduct is objectively unreasonable under most circumstances: "At a minimum, an attorney… should request a bench conference… where he or she can lodge an appropriate objection." *Hodge v. Hurley*, 426 F.3d 368, 386 (6th Cir., 2005). Defense counsel did not even take this minimum step.

First, counsel should have objected when the prosecution introduced evidence of Mr. Roussel's failure to provide his medical records. RP 154-156. Such testimony constituted a comment on his partial pre-arrest silence. *Burke*, 163 Wn.2d at 217. The evidence might have been available to impeach Mr. Roussel, but the testimony came in before Mr. Roussel had taken the witness stand. Furthermore, in the absence of an objection and a limiting instruction, jurors were permitted to use Mr. Roussel's pre-arrest silence as substantive evidence of guilt. *State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997).

Second, counsel should have objected when the prosecutor improperly characterized Mr. Roussel's pre-arrest partial silence as "suspicious." RP 376. This improper comment on Mr. Roussel's pre-arrest silence infringed his constitutional privilege against self-

incrimination. *Burke*, 163 Wn.2d at 217. It encouraged jurors to rely on Mr. Roussel's silence as substantive evidence.

Third, counsel should have objected to the prosecutor's numerous arguments shifting the burden of proof, as outlined above. At a minimum, defense counsel should have requested a sidebar to lodge objections. *Hodge* 426 F.3d at 386.

There is a reasonable probability that counsel's failures to object prejudiced Mr. Roussel. By shifting the burden of proof and by calling the jury's attention to Mr. Roussel's partial pre-arrest silence, the prosecutor unfairly urged the jury to convict for improper reasons. The state's version of events was hotly contested; its evidence was far from overwhelming. Had counsel objected, there is a reasonable probability that the verdicts would have been more favorable to Mr. Roussel. *Kyllo*, 166 Wn.2d at 862.

Defense counsel provided ineffective assistance. *Id.* Mr. Roussel's convictions must be reversed and the case remanded for a new trial. *Id.*

CONCLUSION

Mr. Roussel's convictions must be reversed, and his case remanded for a new trial. First, the trial court should have instructed the

jury on the inferior degree offense of simple assault. Its failure to do so requires reversal of the felony charge and remand for a new trial.

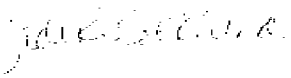
Second, the court should have allowed Mr. Roussel to introduce evidence explaining his self-defense/defense-of-others claim. The court's refusal to allow the evidence infringed Mr. Roussel's right to present a defense and his right to confrontation.

Third, the convictions were based on evidence obtained in violation of the Privacy Act. Fourth, the prosecutor committed misconduct by commenting on Mr. Roussel's right to remain silent and by mischaracterizing the burden of proof.

Fifth, defense counsel provided ineffective assistance. Mr. Roussel was prejudiced by his attorney's failures to object to inadmissible evidence and prosecutorial misconduct.

Respectfully submitted on March 27, 2015,

BACKLUND AND MISTRY



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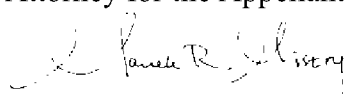

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Lawrence Roussel, DOC #967756
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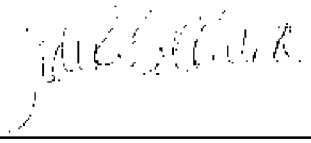
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Cowlitz County Prosecuting Attorney
appeals@co.cowlitz.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 27, 2015.



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